A **BUKIT CERAKAH DEVELOPMENT SDN BHD**

v.

L'GRANDE DEVELOPMENT SDN BHD

B COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
JAMES FOONG JCA
SURIYADI HALIM OMAR JCA
[CIVIL APPEAL NO: W-02-320-2007]
C 22 FEBRUARY 2008

CONTRACT: *Building contract - Set off - Right to - Construction of clause of contract - Interim certificate issued by architect - Whether void - Whether architect functus officio - Bona fides - Pleading -* D *Quantification of liquidated sum - Whether required*

CONTRACT: *Building contract - Construction of terms of contract - Right to set off - Interim certificate issued by architect - Whether void - Whether architect functus officio - Bona fides - Pleading - Quantification of liquidated sum - Whether required*
E

PROFESSIONS: *Architects - Building contract - Construction of terms of contract - Right to set off - Interim certificate issued by architect - Whether void - Whether architect functus officio*

F The appellant was the developer of one Puncak Alam Development project ('project') that came in two phases, Phase 1 and Phase 2 respectively. It employed the respondent to carry out construction of both phases. In point of time Phase 1 came after Phase 2, and two standard contracts in PWD form were entered G into between the parties. As a result of disputes between the parties, the respondent filed two actions, the S3 suit and the S5 suit. In the S3 suit, which was in respect of Phase 2, the respondent claimed a sum of RM5,862,612.33 as being due under interim certificates issued for work done on Phase 2 of the project. H The appellant delivered a defence and counterclaim in which it alleged fraud, breach of contract and negligence on the respondent's part. It claimed a sum of RM46,210,924.68, relying on interim certificate No. 14 issued by the superintending officer ('SO'), the architect in the present case. The S5 suit was I commenced by the respondent to recover a sum of RM3,665,582.94 that was claimed to be due on interim certificates issued in respect of Phase 1. The appellant, in its defence and counterclaim to this

suit, sought to set off monies owing from the respondent to the appellant on the Phase 2 contract against any sum that may be due from the appellant to the respondent under the Phase 1 contract. In support of its defence of set off, it relied on cl. 50 of the Phase 2 contract ('cl. 50'). The judge, on a summons taken out by the respondent under O. 14A of the Rules of the High Court 1980, held against the appellant.

This appeal – by the appellant against that decision – revolved upon the construction of cl. 50, and whether the respondent's following objections to the case being decided in the appellant's favour had merits: (i) that the right to a set off preserved by cl. 50 applied only to monies – to use the language of the clause – "owing from the Contractor to the Government", that is to say, from the respondent to the appellant. In this instance, there were no sums owing from the respondent to the appellant because interim certificate No. 14 issued by the SO and relied upon by the appellant as giving rise to a set off was void, because it was issued after the S5 suit was commenced; (ii) that certificate No. 14 was not issued *bona fide*; (iii) that there was no certificate in the S5 suit certifying that there was a sum to be set off arising out of the S3 suit, and as such, the pre-requisites of cl. 50 were not met and no set off ought to be permitted. The respondent's further complaint under this head was that no liquidated sum had been quantified by the appellant and that this prevented a set off under cl. 50 because there was not – in the words of the clause – "any money owing".

Held (allowing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) Clause 50 expressly permitted a set off in the appellant's favour. The words "shall be entitled to deduct any money owing from the Contractor to the Government" in cl. 50 supported this conclusion. Further, the right of set off was not confined to the particular contract – in this case the Phase 2 contract – but, to use the words of the clause, "any other contracts" to which the appellant and the respondent were parties. Thus, it must perforce include the Phase 1 contract. On this basis, the case should be decided in the appellant's favour. (para 7)

(2) It is not the law that in any circumstance whatsoever an architect is *functus officio* once a court or an arbitrator is seised of a dispute. It depends very much on the terms of the particular contract under which the employer engaged the builder. In other words, it is a question of construction and not a question of general law as to whether an architect is *functus*. Applying what Lord Coulsfield said in the case of *GA Group Ltd v. Scottish Metropolitan Property PLC*, the question to be asked was this: does the particular contract exclude the architect from acting because of a reference to an arbiter, be it an arbitrator or the court? If it does then the architect is contractually proscribed from issuing a certificate after the dispute has been referred to an arbitrator or to the court. By issuing his certificate in those circumstances, he purports to exercise a concurrent jurisdiction he does not have. Hence, he must be held to be *functus officio* and his certificate to be invalid, and all this because of what the contract provides. In the present case, the contract provided quite the opposite. It said in cl. 49 of the contract that no certificate of the SO was to be considered as being conclusive evidence as to "the sufficiency of any work, materials or goods to which it relates." In other words, all issues were open before an arbitrator or a court of law. Therefore, it could not be said that certificate 14 was void because the architect was *functus officio* when he issued it. In this respect, the case of *JA Milestone & Sons Ltd (In Liquidation) v. Yates Castle Brewery* was clearly distinguishable on its facts. The decision of Singleton J there was entirely supportable on the peculiar facts of that case. The agreement there was differently constructed and Singleton J quite rightly found that the architect, by issuing his certificate after the dispute had gone to arbitration, was purporting to decide the very issue that fell to be decided by the arbitrator. For the reasons already stated, that was not the case here. The first ground of objection accordingly failed. *GA Group Ltd v. Scottish Metropolitan Property PLC* (foll); *JA Milestone & Sons Ltd (In Liquidation) v. Yates Castle Brewery* (dist). (paras 10, 14 & 15)

(3) Whether certificate No. 14 was issued *bona fide* or not was a matter to be tried on the facts as established based on the evidence adduced at a full trial of the action. It was not a matter that was fit for summary disposal through the O. 14A procedure. (para 16)

(4) The respondent's third point was really a pleading point. If the defence and counterclaim in the S5 suit were examined, it would be seen that the appellant had indeed pleaded certificate No. 14. And there was cl. 50 which permitted a deduction against any contract between the same parties. (para 17)

(4a) The phrase "any money owing" did not refer to a liquidated sum and thereby limit or restrict the appellant's right only to a set off at law. If the parties wanted to do that they would have had to be more specific in the use of their language. Hence, the phrase "any money owing" employed by cl. 50 did not have the effect of depriving the appellant of its right of equitable set off. On a proper construction of cl. 50, the appellant did not actually have to produce a specific and final figure. All he had to do was to quantify his loss in a *bona fide* way by reasonable means, which he had done. Whether the set off would succeed on merits was a matter that must await the trial of the action. As such, the third ground of opposition raised by the respondent failed. *"The Nanfri"; Federal Commerce and Navigation Co v. Molena Alpha Inc* (foll); *Hiap Tian Soon Construction Pte Limited v. Hola Development Pte Ltd* (foll). (paras 17 & 20)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Perayu adalah pemaju bagi projek yang dipanggil Pembangunan Puncak Alam ('projek') yang mengandungi dua fasa, iaitu Fasa 1 dan Fasa 2. Perayu telah melantik responden untuk melaksanakan pembangunan di kedua-dua fasa. Dari segi masa, Fasa 1 perlu dibangunkan selepas Fasa 2, dan dua kontrak standard di dalam Borang JKR telah dimeterai oleh kedua-dua pihak. Ekoran dari pertikaian yang berbangkit di antara mereka, responden telah memfail dua tindakan, iaitu guaman S3 dan guaman S5. Di dalam guaman S3, berhubung dengan Fasa 2, responden menuntut sejumlah RM5,862,612.33 sebagai jumlah terhutang di bawah sijil-sijil interim yang dikeluarkan bagi kerja-kerja yang disiapkan di bawah Fasa 2 tersebut. Perayu mengemukakan pembelaan dan juga tuntutan balas, di mana ia mendakwa fraud, kemungkiran kontrak dan kecuaian di pihak responden. Ia juga menuntut sejumlah RM46,210,924.68, dengan bergantung kepada sijil interim No. 14 yang dikeluarkan oleh pegawai yang menjaga ('SO'), iaitu

A arkitek dalam kes semasa. Guaman S5 pula telah dimulakan oleh responden untuk mendapatkan sejumlah RM3,665,582.94 yang dikatakan terhutang di bawah sijil-sijil interim yang dikeluarkan berkaitan Fasa 1. Perayu, dalam pembelaan dan tuntutan balasnya terhadap guaman ini, memohon untuk membuat tolakan akan wang
B yang dihutang oleh responden kepada perayu di dalam kontrak Fasa 2 dengan mana-mana jumlah yang dihutang oleh perayu kepada responden di bawah Fasa 1 kontrak. Dan bagi menyokong pembelaan tolakannya, ia bergantung kepada fasal 50 kontrak Fasa 2 ('fasal 50'). Apapun, berdasarkan saman yang diambil oleh
C responden di bawah A. 14A Kaedah-Kaedah Mahkamah Tinggi 1980, hakim memutuskan secara yang tidak berpihak kepada perayu.

Rayuan di sini – oleh perayu terhadap keputusan di atas – berkisar
D di sekitar pentafsiran fasal 50, dan sama ada bantahan-bantahan berikut oleh responden bermerit, iaitu: (i) bahawa hak kepada tolakan yang terkandung di dalam fasal 50 hanya terpakai kepada wang – yang mengikut bahasa di dalam fasal – "yang terhutang oleh kontraktor kepada Kerajaan", yakni, dari responden kepada
E perayu. Dalam kes ini, tidak ada jumlah wang yang terhutang dari responden kepada perayu kerana sijil interim No. 14 yang dikeluarkan oleh SO dan yang menjadi pergantungan perayu bagi menyatakan bahawa tolakan wujud adalah tak sah, disebabkan ianya dikeluarkan hanya selepas guaman S5 bermula; (ii) bahawa
F sijil No. 14 tidak dikeluarkan *bona fide*; (iii) bahawa tidak ada sijil di dalam guaman S5 yang mengesahkan bahawa terdapat jumlah yang akan ditolak dari guaman S3, dan kerana itu, syarat-syarat fasal 50 telah tidak dipenuhi dan tiada tolakan boleh dibenarkan. Bantahan responden seterusnya di bawah tajuk ini adalah bahawa
G tidak ada suatu jumlah tertentu telah dikenalpasti oleh perayu dan bahawa itu telah menghalang tolakan di bawah fasal 50 kerana tidak wujud – seperti yang disebut oleh fasal – "mana-mana jumlah wang yang terhutang".

H **Diputuskan (membenarkan rayuan)**
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Fasal 50 secara terus membenarkan tolakan untuk manfaat perayu. Perkataan "adalah berhak untuk menolak mana-mana
I wang yang terhutang oleh kontraktor kepada Kerajaan" di dalam fasal 50 menyokong konklusi ini. Selain itu, hak tolakan tidak terhad kepada mana-mana kontrak tertentu – dalam kes

ini kontak Fasa 2 – tetapi, dengan menggunakan perkataan fasal, "mana-mana kontrak lain" yang perayu dan responden menjadi pihak. Oleh itu, ia seharusnya merangkumi kontrak Fasa 1. Atas dasar ini, kes harus diputuskan dengan berpihak kepada perayu.

(2) Undang-undangnya bukanlah bahawa dalam keadaan apapun seseorang arkitek akan menjadi *functus officio* sebaik sahaja sebuah mahkamah atau seorang penimbangtara mengambil kuasa terhadap pertikaian. Ia amat bergantung kepada terma-terma kontrak terbabit di bawah mana seseorang majikan itu mengambil pemaju. Dengan kata lain, ia adalah soal pentafsiran dan bukannya satu perkara undang-undang umum mengenai sama ada seorang arkitek telah *functus*. Menggupakai apa yang dikatakan Lord Coulsfield di dalam *GA Group Ltd v. Scottish Metropolitan Property PLC*, soalan yang harus ditanya adalah seperti berikut: adakah kontrak yang berkenaan itu menghalang arkitek dari bertindak disebabkan wujudnya rujukan kepada pengadil, sama ada ianya seorang penimbangtara ataupun mahkamah? Jika ya, maka arkitek dilarang melalui kontrak dari mengeluarkan sijil selepas pertikaian dirujuk kepada penimbangtara atau mahkamah. Maka dengan mengeluarkan sijilnya dalam keadaan yang sedemikian, beliau telah melaksanakan bidangkuasa bersama yang tidak beliau miliki. Dengan itu beliau hendaklah dianggap sebagai *functus officio* sekaligus menjadikan sijilnya tak sah dan semua ini adalah disebabkan apa yang diperuntukkan oleh kontrak. Namun, dalam kes semasa, kontrak memperuntukkan sebaliknya. Ia menyatakan di dalam fasal 49 kontrak bahawa tiada sijil dari SO boleh dianggap sebagai keterangan muktamad mengenai "kecukupan mana-mana kerja, bahan atau barang yang berkaitan dengannya." Dengan lain perkataan, semua persoalan adalah terbuka di hadapan penimbangtara atau mahkamah keadilan. Oleh itu, adalah boleh dikatakan bahawa sijil 14 adalah tak sah disebabkan arkitek *functus officio* sewaktu beliau mengeluarkannya. Dalam hubungan ini, kes *JA Milestone & Sons Ltd (In Liquidation) v. Yates Castle Brewery* jelas boleh dibezakan di atas fakta-faktanya. Penghakiman Singleton H di situ hanya boleh disokong berdasarkan fakta-fakta khusus kes itu. Perjanjian di situ digubal secara yang berbeza dan Singleton H dengan betulnya mendapati bahawa dengan mengeluarkan sijilnya selepas pertikaian dirujuk kepada timbangtara, arkitek

A cuba memutuskan isu yang sepatutnya diputuskan oleh penimbangtara. Atas sebab-sebab yang dikatakan, keadaan kes di sini bukanlah seperti itu. Oleh itu, alasan pertama bantahan semestinya gagal. *GA Group Ltd v. Scottish Metropolitan Property PLC* (diikuti); *JA Milestone & Sons Ltd*
B *(In Liquidation) v. Yates Castle Brewery* (dibezakan).

(3) Sama ada sijil No. 14 telah dikeluarkan *bona fide* atau tidak adalah satu perkara yang perlu dibicarakan di atas fakta-faktanya dengan berdasarkan keterangan-keterangan yang
C dikemukakan di perbicaraan penuh tindakan. Ia bukan satu perkara yang sesuai untuk dilupuskan secara terus melalui prosedur A. 14A.

(4) Perkara ketiga yang dibangkitkan responden adalah sebenarnya perkara pliding. Jika pembelaan dan tuntutan
D balas di guaman S5 diteliti, akan dilihat bahawa perayu sememangnya telah memplid sijil No. 14. Di samping itu terdapat fasal 50 yang membenarkan potongan terhadap mana-mana kontrak di antara pihak-pihak.

E **(4a)** Ungkapan "mana-mana wang yang terhutang" tidak merujuk kepada satu jumlah yang tertentu dan dengan itu telah menghadkan hak perayu hanya kepada penolakan di sisi undang-undang. Jika pihak-pihak berhasrat untuk berbuat demikian, mereka seharusnya bertindak lebih spesifik dalam
F penggunaan bahasa mereka. Oleh itu, ungkapan "mana-mana wang yang terhutang" yang digunapakai oleh fasal 50 tidak mempunyai kesan mengenepikan perayu dari menjadi berhak kepada penolakan. Atas pentafsiran wajar fasal 50, perayu sebenarnya tidak perlu mengemukakan suatu angka yang
G spesifik atau muktamad. Apa yang perlu dibuatnya hanyalah untuk mengira kerugiannya dengan *bona fide* dan melalui kaedah-kaedah yang munasabah, yang mana telah dilakukannya. Sama ada penolakan berjaya di atas merit adalah satu perkara yang akan diputuskan di dalam perbicaraan tindakan.
H Oleh itu, alasan ketiga bantahan yang dibangkitkan responden juga gagal. *"The Nanfri"; Federal Commerce and Navigation Co v. Molena Alpha Inc* (diikuti); *Hiap Tian Soon Construction Pte Limited v. Hola Development Pte Ltd* (diikuti).

I *[Perintah sekadarnya.]*

Case(s) referred to:

GA Group Limited v. Scottish Metropolitan Property Plc [1992] Inner House Cases ***(foll)***

Hiap Tian Soon Construction Pte Limited v. Hola Development Pte Ltd [2003] 1 SLR 667 ***(foll)***

JA Milestone & Sons Ltd (In Liquidation) v. Yates Castle Brewery [1938] 2 KBD 439 ***(dist)***

L'grande Development Sdn Bhd v. Bukit Cerakah Development Sdn Bhd [2007] 8 CLJ 507 HC ***(refd)***

Morgan & Son, Ltd v. Martin Johnson, Ltd [1949] 1 KB 107 ***(refd)***

Pacific Rim Investments Pte Ltd v. Lam Seng Tiong [1995] 3 SLR 1 ***(refd)***

Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345 SC ***(refd)***

Piggott v. Williams [1821] 56 ER 1027 ***(refd)***

"The Nanfri"; Federal Commerce and Navigation Co v. Molena Alpha Inc [1978] QB 927 ***(foll)***

Legislation referred to

Rules of the High Court 1980, O. 14A

For the appellant - CK Yeoh (Jason Chan with him); M/s Ranjit Ooi & Robert Low

For the respondent - Rajendra Navatnam (Wong Hin Loong with him); M/s Azman Davidson & Co

[Appeal from High Court, Kuala Lumpur; Suit No: D8(S5)-22-241-2000]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] This appeal turns upon the construction of a clause in a standard form PWD (JKR) contract in its application to the facts that are relevant to this dispute. I will refer to the clause in question at some length later. Let me first set out the facts and background against which this appeal rests.

[2] There is a project called the Puncak Alam Development. The appellant is the developer of that project. The project comes in two phases. It employed the respondent to carry out construction of both phases. Phase 2 was to consist of 331 units of double storied terrace houses. A letter of award was issued by

A the appellant to the respondent in respect of Phase 2 on 15 November 1998. Later a contract in the PWD form was executed by the parties.

[3] In point of time Phase 1 came after Phase 2. It was to B comprise of 16 blocks of single storied terrace houses. The letter of award in respect of Phase 1 was issued on 5 July 1999. A second standard contract in PWD form was entered into between the parties.

C **[4]** Later, disputes arose between the parties. Two actions were filed. Both by the respondent. I will call them the S3 and S5 suits. Because they were filed in the 3rd and 5th courts respectively of the Civil Division of the Kuala Lumpur High Court. The S3 suit was in respect of Phase 2. In it the respondent D claimed a sum of RM5,862,612.33 as being due under interim certificates issued for work done on Phase 2 of the project. The appellant delivered a defence and counterclaim in which it alleged fraud, breach of contract and negligence on the respondent's part. In its counterclaim it claimed a sum of RM46,210,924.68 on the E ground that 243 out of the 331 units lacked structural integrity and had therefore to be demolished. It relied on interim certificate 14 issued by the superintending officer, that is to say, the architect in the present case.

[5] The S5 suit was commenced by the respondent to recover F a sum of RM3,665,582.94 that was claimed to be due on interim certificates issued in respect of Phase 1. The appellant delivered its defence and counterclaim to the S5 suit. Among other pleas taken, the appellant sought to set off monies owing from the respondent to the appellant on the Phase 2 Contract against any G sum that may be due from the appellant to the respondent under the Phase 1 Contract. In support of its defence of set off, it relied on cl. 50 of the Phase 2 Contract. The question is whether it could do so. The judge on a summons taken out by the respondent under RHC O. 14A held against the appellant. His H judgment is reported in [2007] 8 CLJ 507. The appellant has appealed to us against that decision.

[6] The starting point is the general law regarding the defence of set off in the context of a building contract. It is a principle of I general application that both an employer and a builder have a right of set off against each other in the absence of a contrary

intention expressed by the parties. Such a contrary intention may appear from express words used by the parties or by clear implication from what they said or did. See, *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd* [1995] 2 CLJ 345. Next, I turn to examine cl. 50 to see if it either expressly or by clear implication excludes the right to a set off provided by the general law. This is what the clause says:

> The Government or the S.O. on its behalf shall be entitled to deduct any money owing from the Contractor to the Government under this Contract from any sum which may become due or is payable to the Contractor under this Contract or any other contracts to which the Government and the Contractor are parties thereto. The S.O. in issuing any certificate under Clause 47, shall have regard to any such sum so chargeable against the Contractor, provided always that this provision shall not affect any other remedy to which the Government may be entitled for the recovery of such sums.

References in the clause to "the Government" are, of course, to the appellant employer, while references to the S.O. or superintending officer are to the architect appointed for the project.

[7] In my judgment, cl. 50 expressly permits a set off in the appellant's favour. The words "shall be entitled to deduct any money owing from the Contractor to the Government" in cl. 50 support my conclusion. Further, the right of set off is not confined to the particular contract – in this case the Phase 2 contract – but, to use the words of the clause, "any other contracts" to which the appellant and the respondent are parties. Hence, it must perforce include the Phase 1 contract. On this basis, the case should be decided in the appellant's favour. But, says the respondent, there are three impediments to this result.

[8] In the first place, it is contended that the right to a set off preserved by cl. 50 applies only to monies – to use the language of the clause – "owing from the Contractor to the Government", that is to say, from the respondent to the appellant. In the present case there are no sums owing from the respondent to the appellant because interim certificate No. 14 issued by the S.O. (the architect) and relied upon by the appellant was as giving rise to a set off is void. It is void because it was issued after the S5 suit was commenced. In support of this argument the respondent relied on *J.A. Milestone & Sons Ltd (In Liquidation) v. Yates Castle Brewery* [1938] 2 KBD 439 where Singleton J said this:

A dispute had arisen between the parties, and, on the decision of the Court of Appeal in *Lloyd Bros v. Milward* [1895] 2 Hudson's BC, 4th edn, 262; 7 Digest 359, 107, it was not open to the architect to give further certificates. If he could do so in the present case, he would be determining the very point on which the dispute had arisen. He would indeed be determining a difficult question of law. The parties were at issue. The defendants knew that the plaintiffs' solicitors were about to issue a writ, and, on the very day on which the writ was issued, the architect gave certificates to some subcontractors, and gave them to others at a later date. I do not consider that those certificates have any effect in law. They cannot be regarded as valid certificates, nor as valid directions to the defendants to pay the subcontractors.

[9] In answer to this argument, the appellant relies on the decision of the Inner House of the Court of Session of Scotland in *GA Group Limited v. Scottish Metropolitan Property Plc* [1992] Inner House Cases. In that case, counsel during argument referred the court to *Milestone v. Yates*. Lord Coulsfield (with whom Lord Murray and Lord Penrose agreed) appears to have been unimpressed with that case. For this is the conclusion that he reached on the very point at issue before us:

In treating the question as being whether the architect was *functus officio*, the arbiter seems to have adopted an approach put before him by the claimants. It seems to me, however, that that approach may be misleading. As long as the contract continues, the architect remains in office and must, in my view, be entitled and, indeed obliged, to exercise the powers and duties of that office, as the situation requires. It is obvious, for example, that he remains entitled to certify payments to the contractors. The proper questions to ask are, in my view, whether in any particular respect the architect is excluded from acting because of a reference to an arbiter or whether in any such respect he, and his employers, are bound by any decision of the arbiter. The answer to these questions will depend on the particular circumstances, and I doubt if any general statement can properly be made.

[10] With respect, I agree. It is not the law that in any circumstance whatsoever an architect is *functus officio* once a court or an arbitrator is seised of a dispute. It depends very much on the terms of the particular contract under which the employer engaged the builder. In other words, it is a question of construction and not a question of general law as to whether an architect is *functus*.

[11] In the present case the position is governed by cls. 49, 54(e) and Document G/2-Preliminaries & General Conditions of Contract. Each of these read as follows.

First, cl. 49:

> No certificate of the S.O. under any provision of this Contract shall be considered as conclusive evidence to the sufficiency of any work, materials or goods to which it relates, nor shall it relieve the Contractor from his liability to amend and make good all defects, imperfections, shrinkages, or any other faults whatsoever as provided by this Contract. In any case, no certificate of the S.O. shall be final and binding in any dispute between the Government and the Contractor if the dispute is brought whether before an arbitrator or in the Courts.

Second, cl. 54(e):

> The Arbitrator shall have power to review and revise any certificate, opinion, decision, requisition or notice and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given in accordance with sub-clause (c) aforesaid, in the same manner as if no such certificate, opinion, decision, requisition or notice had been given.

Last, Document G/2-Preliminaries & General Conditions of Contract:

> In relation to Clauses 47(a) and (b) of the Conditions of Contract, the Contractor shall note that all interim valuations made by the Consultant Quantity Surveyor are merely recommendations for payment and toward this end, the Superintending Officer (S.O.) reserves the right to cause any amendments to be made as the Superintending Officer (S.O.) deems fit and the date upon which the Superintending Officer (S.O.) endorses the said recommendation or amended interim valuation shall be held as the date of the Superintending Officer (S.O.) valuation for the purpose of Clause 47(a). The exercise of this right by the Superintending Officer (S.O.) shall not entitle the Contractor to any claim for breach of contract, extension of time, loss of profit, expenses, interests and/or the like.

[12] It is submitted by the appellant that the combined effect of these terms of the contract is as follows:

(i) the S.O.'s certificate is not binding and conclusive;

(ii) the arbitrator is entitled to review and revise any certificate issued; and

(iii) the S.O. has the right to cause any amendments to be made as he deems fit and the date upon which the S.O. endorses the said recommendation or amended interim valuation shall be held as the date of the S.O.'s valuation for the purpose of cl. 47(a).

[13] Upon the foregoing basis, it was argued for the appellant that the parties intended that the S.O. in the Phase 2 Contract was not to be treated as being *functus officio* despite the parties having taken their dispute to the court. It was argued that unlike *Milestone v. Yates* no issue arises in the present case of an exercise of a concurrent jurisdiction between the S.O. and the court or arbitrator. According to the terms of the contract, the arbitrator, or as in the present case, the court's decision shall prevail. No question arises here as to the determination by the S.O. of the very point upon which the dispute falls to be determined.

[14] In my judgment there is merit in this argument. Applying what Lord Coulsfield said in the *GA Group* case, the question to be asked is this: does the particular contract exclude the architect from acting because of a reference to an arbiter, be it an arbitrator or the court? If it does then the architect is contractually proscribed from issuing a certificate after the dispute has been referred to an arbitrator or to the court. By issuing his certificate in those circumstances, he purports to exercise a concurrent jurisdiction he does not have. Hence he must be held to be *functus officio* and his certificate to be invalid. And all this because of what the contract provides.

[15] In our case the contract provides quite the opposite. It says in cl. 49 that no certificate of the S.O. is to be considered as being conclusive evidence as to "the sufficiency of any work, materials or goods to which it relates." In other words, all issues are open before an arbitrator or a court of law. Hence, it cannot be said that certificate 14 is void because the architect was *functus officio* when he issued it. In this respect, *Milestone v. Yates* is clearly distinguishable on its facts. The decision of Singleton J is entirely supportable on the peculiar facts of that case. The agreement there was differently constructed and Singleton J quite rightly found that the architect, by issuing his certificate after the dispute had gone to arbitration was purporting to decide the very issue that fell to be decided by the arbitrator. For the reasons already stated, that is not the case here. The first ground of objection accordingly fails.

[16] The second point raised by the respondent in answer to the plea of set off based on certificate No. 14 is that the certificate was not issued *bona fide*. The short answer to this submission is that the *bona fides* or lack of it is a matter to be tried on the facts as established based on the evidence adduced at a full trial of the action. It is not a matter that is fit for summary disposal through the O. 14A procedure.

[17] The respondent's third and final point in opposition to the appeal is this. There is no certificate in the S5 suit certifying that there is a sum to be set off arising out of the S3 suit. As such the pre-requisites of cl. 50 are not met and as such no set off ought to be permitted. This in my view is really a pleading point. If you examine the defence and counterclaim in the S5 suit, you will see that the appellant has indeed pleaded certificate No. 14. And you have cl. 50 which permits a deduction against any contract between the same parties. The respondent's further complaint under this head is that no liquidated sum has been quantified by the appellant and that this prevents a set off under cl. 50 because there is not– in the words of the clause – "any money owing". In my judgment, the phrase "any money owning" does not refer to a liquidated sum and thereby limit or restrict the appellant's right only to a set off at law. If the parties wanted to do that they would have had to have been more specific in the use of their language. Hence, in my view, the phrase "any money owning" employed by cl. 50 does not have the effect of depriving the appellant of its right of equitable set off. All that is required to maintain a plea of equitable set off is a cross claim that goes "directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account his cross-claim", per Lord Denning MR in *"The Nanfri"; Federal Commerce and Navigation Co v. Molena Alpha Inc* [1978] QB 927.

[18] Equity has always permitted a litigant to plead an unliquidated sum by way of a set off. Thus, in *Piggott v. Williams* [1821] 56 ER 1027 a solicitor's demand for remuneration was met by a defence of a set off claiming that the work had been negligently done. The set off was for an unliquidated sum. Yet, the court permitted it to remain as part of the defendant's pleaded case. *Piggott v. Williams* was approved by the Court of Appeal in *Morgan & Son, Ltd v. Martin Johnson, Ltd* [1949] 1 KB 107.

[19] In *Hiap Tian Soon Construction Pte Limited v. Hola Development Pte Ltd* [2003] 1 SLR 667, the court was faced with a clause that employed the phrase "money due". It was held that the phrase did not exclude an equitable set off. Lai Siu Chiu J, after citing the judgment of Thean J in *Pacific Rim Investments Pte Ltd v. Lam Seng Tiong* [1995] 3 SLR 1 had this to say:

> … all that is required from the party purporting to exercise the right of set-off is that he seeks to quantify his loss in a *bona fide* way by reasonable means. The party does not actually have to produce a specific and final figure, quantified by professional quantity surveyors, contrary to what the first plaintiff suggested. Similarly, the fact that the estimated figure may eventually turn out to be too high or too low is not, in itself, sufficient to preclude a party from relying on set-off as a defence.

[20] I think that the same is to be said in this case. On a proper construction of cl. 50, the appellant does not actually have to produce a specific and final figure. All he has to do is to quantify his loss in a *bona fide* way by reasonable means. That he has done. Whether the set off will succeed on merits is a matter that must await the trial of the action. As such the third ground of opposition raised by the respondent fails.

[21] For the reasons already given I would allow the appeal and set aside the judgment and all orders made by the learned judge. We were informed by counsel during argument that if the appeal is to succeed as it has, then the S5 suit is to be stayed and the S3 suit will proceed to trial. I would therefore make a consequential order in those terms. The costs of this appeal and those incurred in the court below must be paid by the respondent to the appellant. But I would direct that the taxation of the appellant's bills be stayed until after the outcome of the S3 suit. The deposit in court will be refunded to the appellant.

[22] My learned brothers James Foong Cheng Yuen and Suriyadi bin Halim Omar, JJCA have seen this judgment in draft and have expressed their agreement with it.